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No. 80-613

In the Supreme Court of the United States

OCTOBER TERM, 1980

SHOSHONE AND ARAPAHOE TRIBES, PETITIONERS

v.

DRY CREEK LODGE, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

WADE H. MCCREE, JR.
Solicitor General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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QUESTION PRESENTED

Whether an Indian Tribe is immune from suit brought by a non-Indian to recover damages for an alleged violation of the Indian Civil Rights Act.

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INTEREST OF THE UNITED STATES

The interest of the United States arises out of its special relationship to American Indians. *United States* v. *Kagama*, 118 U.S. 375, 382 (1886); *United States* v. *Klamath Indians*, 304 U.S. 119, 123 (1938).

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–8a) is reported at 623 F.2d 682. An earlier opinion of the court of appeals in this case (Pet. App. 21a–39a) is reported at 515 F.2d 926. The various orders and findings of the district court (Pet. Apps. B, C, E, F, G) are not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a–8a) was entered on June 20, 1980. A petition for rehearing en banc was denied on July 18, 1980 (Pet. App. 53a–56a). The petition for a writ of certiorari was filed on October 15, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The petitioners are the Shoshone and Arapahoe Tribes of the Wind River Indian Reservation in Wyoming. The Tribes were sued in the United States District Court for the District of Wyoming by respondents, who are two non-Indian owners of Dry Creek Lodge, Inc. (the Cooks), that corporation, several Indian employees of the corporation, and a non-

Indian former owner of the land where the lodge is located.[1]

Respondents Albert and Elizabeth Cook owned 160 acres of land within the Wind River Indian Reservation. Access to the land was by a private dirt road that crossed trust allotments of the Bonatsie family, members of the Shoshone Tribe. Until 1974, the Cooks used their land solely for stock-raising and residential purposes. The Bonatsies permitted them to use the road, although the Cooks had not obtained a right-of-way pursuant to procedures set out at 25 C.F.R. Part 161 (Pet. App. 10a, 23a).

Early in 1974 the Cooks began to construct a lodge, containing a bar and restaurant, on the land. The Bonatsies objected to use of the access road for patrons of the lodge. They complained to the Joint Business Council of the Tribes. The Joint Business Council, by resolution, requested the Superintendent of the Reservation to prevent further use of the road. A barricade was thereupon erected by members of the Bonatsie family (Pet. App. 11a.)

The respondents brought suit for a declaration that they owned a right-of-way across the Bonatsies' land; to enjoin federal officials and tribal members from interfering with their alleged right-of-way; and to obtain

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[1] While the complaint also named as defendants the United States, the Secretary of the Interior, the Area Director of the Bureau of Indian Affairs, the Wind River Agency Superintendent, a BIA law enforcement officer, the Joint Business Council of the Tribes and the individual members thereof, and individual Indian allottees, claims against all defendants except the Tribes have been resolved against the plaintiffs at various stages of the case.

money damages for alleged conspiracies to deprive them of civil rights and for violations of due process and equal protection. The district court issued a temporary restraining order allowing use of the road for noncommercial purposes, and the barricade was removed. After a hearing on the motion for preliminary injunction, the court issued findings of fact and conclusions of law (Pet. App. 9a–18a), and dismissed the case for lack of jurisdiction (Pet. App. 19a–20a). The court found that the plaintiffs failed to show that they owned a right-of-way; that the United States and the Tribes were immune from suit; and that the complaint did not allege facts sufficient to establish that any of the individual defendants had acted outside the scope of his authority or conspired to violate respondents' civil rights (Pet. App. 13a–18a).

On appeal, the United States Court of Appeals for the Tenth Circuit reversed the district court's dismissal of the case against the Tribes, the Joint Business Council, and the federal officials (Pet. App. 21a–39a). Although the court of appeals agreed with the district court that the United States is immune from suit (Pet. App. 25a), the court of appeals ruled that the Indian Civil Rights Act of 1968, 25 U.S.C. 1301 *et seq.* (ICRA), waived the Tribes' sovereign immunity and created a federal cause of action (Pet. App. 31a–35a).

On remand, after presentation of the plaintiffs' evidence, the district court directed verdicts in favor of all defendants except the Tribes and two federal officials. The jury then considered claims against the Tribes for denial of equal protection and deprivation of

liberty without due process in violation of the ICRA, 25 U.S.C. 1302(8), and against the federal officials for deprivation of liberty without due process. The jury found in favor of the federal officials but awarded judgments totalling $525,000 against the Tribes (Pet. App. 41a–42a).

Upon motion of the Tribes, the district court set aside the jury verdict and granted a new trial with respect to liability and damages (Pet. App. 45a), on the ground that the jury had disregarded the court's instructions. Soon thereafter, this Court decided *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 58–59 (1978), holding that the ICRA does not waive a Tribe's sovereign immunity. The district court then granted the Tribes' motion to dismiss, on the ground that *Santa Clara* "squarely applies to this action" (Pet. App. 46a).

A divided court of appeals reversed and remanded for a new trial on the issue of damages (Pet. App. 1a–7a). The court of appeals majority concluded that *Santa Clara* was distinguishable because that case involved an internal dispute between tribal members and the tribal government (Pet. App. 5a). The majority also expressed its view that respondents would have no other remedy and concluded that "[t]here has to be a forum where the dispute can be settled" (Pet. App. 6a). Judge Holloway dissented, concluding that the "broad terms" of the *Santa Clara* opinion did not support the majority's limitation of the sovereign immunity holding in *Santa Clara* to intra-tribal disputes (Pet. Ap. 7a–8a).

The Tribes' petition for rehearing with suggestion for rehearing en banc was denied on July 18, 1980 (Pet. App. 53a).

DISCUSSION

The court of appeals was incorrect in holding that the Tribes' immunity from suit does not extend to suits by non-Indians for money damages for violation of the ICRA. The decision is so clearly erroneous under decisions of this Court respecting tribal immunity that summary reversal is warranted.

1. The court of appeals' ruling that the Tribes are subject to damage suits under the ICRA cannot be reconciled with this Court's decision in *Santa Clara Pueblo* v. *Martinez*, *supra*, 436 U.S. at 58–59. There, the Court stated that "tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers," and that "a waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.' " *Id.* at 58, quoting *United States* v. *Testan*, 424 U.S. 392, 399 (1976); see also *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980). Finding no "unequivocal expression of contrary legislative intent," the Court held that "suits against the tribe under the ICRA are barred by its sovereign immunity from suit." 436 U.S. at 59. The Court further held that, even in the absence of sovereign immunity, there is no implied federal right of action under the ICRA. 436 U.S. at 59–72.

Nothwithstanding this Court's explicit holdings in *Santa Clara*, the court of appeals in the instant case found an implied waiver of the Tribes' sovereign im-

munity in the ICRA and a private right of action in federal court against the Tribes under that Act. The court of appeals distinguished *Santa Clara* on the ground that it involved an "intratribal" dispute, concerning membership in the Tribe (Pet. App. 5a–6a). But there is nothing in *Santa Clara* that limits a tribe's sovereign immunity to suits arising from intra-tribal disputes.[2] To the contrary, this Court supported its sovereign immunity holdings in *Santa Clara* by citing (436 U.S. at 58) earlier decisions which did *not* involve intra-tribal disputes. One such case was *Puyallup Tribe* v. *Washington Dep't of Game*, 433 U.S. 165, 172–173 (1977), where the State of Washington was precluded by the doctrine of sovereign immunity from obtaining any relief against the Puyallup Tribe. Similarly, in *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512–513 (1940), the Court refused, on sovereign immunity grounds, to permit a non-Indian surety company to assert cross-claims for damages against the Choctaw and

[2]The discussion in *Santa Clara* regarding the availability of tribal courts to resolve the membership dispute there at issue (436 U.S. at 59–72), upon which the court of appeals relied (Pet. App. 6a–7a), was in connection with whether there was a private right of action under the ICRA against a tribal official who was *not* protected by the Tribe's immunity from suit (436 U.S. at 59). The portion of the *Santa Clara* opinion affirming the tribe's sovereign immunity from suit (*id.* at 58–59) makes no mention of remedies in tribal court. Even where a suit against individual tribal officers is not barred by the tribe's sovereign immunity, there is no basis for the court of appeals' implicit holding that there is a private right of action for damages under the ICRA when the plaintiff is a non-Indian. This Court's decision in *Santa Clara* did not turn on the identity of the plaintiff. The Court need not reach that question here, however, because the suit against the Tribes is barred by sovereign immunity.

Chickasaw Nations. Indeed, one of the plaintiffs in *Santa Clara* itself, Audrey Martinez, had been denied admission to the Tribe, and the Court recognized that the Martinez children "may not vote in tribal elections or hold secular office in the tribe; moreover, they have no right to remain on the reservation in the event of their mother's death * * * " (436 U.S. at 52–53). For practical purposes, then, the Martinez children stood on the same footing vis-a-vis the tribe as non-Indian residents of the reservation. See *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, No. 78–630 (June 10, 1980), slip op. 24.[3]

The decision below rests in large part on the belief that "[t]here has to be a forum where the dispute can be settled" (Pet. App. 6a). However, the purpose of sovereign immunity is to protect the sovereign against suits in *any* court, unless immunity has been waived. In the instant case, neither Congress nor the Tribes have waived that immunity. In any event, respondents were not entirely without redress. They were permitted to pursue their suit against the federal officials and the individual Indians, but simply lost on the merits.[4]

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[3]The court's attempt to limit tribal immunity to intra-tribal disputes is particularly inexplicable in view of the Tenth Circuit's earlier en banc decision in *Merrion* v. *Jicarilla Apache Tribe*, 617 F.2d 537 (10th Cir.), cert. granted, No. 80–11 (Oct. 6, 1980). In the context of a suit by non-Indians under the ICRA, the court there stated (617 F.2d at 540) that a tribe could not be sued absent consent. Although the court found such consent, it clearly recognized that *Santa Clara* and *United States Fidelity & Guaranty Co.* applied with full force to suits by non-Indians.

[4]It appears that respondents also could have sued the individual Shoshone defendants in the Court of Indian Offenses for

2. Sovereign immunity is of vital importance to Indian tribes. As this Court noted in *Santa Clara*, Congress, in enacting the ICRA, did not want to "impose serious financial burdens on already 'financially disadvantaged' tribes" by subjecting them to suit in federal court (436 U.S. at 64). That rationale would appear to apply even more strongly here, where substantial damages were sought and awarded,[5] than in *Santa Clara*, which considered only declaratory and injunctive relief. It would serve no rational policy to make immunity depend upon the identity of the plaintiffs, because the detriment to the tribe is the same whether a judgment is awarded to an Indian or a non-Indian. The decision below, which can be read to eliminate the

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the Wind River Reservation, which court has "jurisdiction of all suits wherein the defendant is a member of the tribe * * *." 25 C.F.R. 11.22. This Court noted in *Santa Clara* that "[t]ribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." 436 U.S. at 65. Although respondents alleged that the tribal judge indicated an unwillingness to hear their case, they did not test his unwillingness by actually filing a complaint. Dismissal of the case would have been appealable under 25 C.F.R. 11.6.

[5]The substantial award of damages against the Tribes here apparently was based on no more involvement by the Tribes in the temporary closing of the road than the passage of a resolution by the Joint Tribal Business Council requesting assistance from the reservation superintendent (Pet. App. 11a). As noted above (see page 4, *supra*) a new trial was ordered by the district court on the issue of liability and damages. Nonetheless, the jury's award of some $525,000 vividly underscores the threat to tribes that would be posed by finding an implied waiver of sovereign immunity from suits brought by non-Indians—plaintiffs who may often be particularly hostile to tribal programs.

defense of sovereign immunity whenever the plaintiff is a non-Indian, could seriously disadvantage the many tribes within the Tenth Circuit and encourage litigation against tribes in other circuits. This result would be inconsistent with Congress' judgment not to impose financial burdens on tribes by subjecting them to suit in federal court.

3. While the case is important, the issue presented has been thoroughly considered and settled in *Santa Clara* and earlier cases. The holding that tribal immunity does not apply to suits by non-Indians is flatly inconsistent with cases such as *United States* v. *United States Fidelity & Guaranty Co.*, *supra*; *Puyallup Tribe* v. *Washington Dep't of Game*, *supra*, and conflicts with the established principle that sovereign immunity cannot be waived by implication, *Santa Clara Pueblo* v. *Martinez*, *supra*, 436 U.S. at 59. We therefore suggest that the case is appropriate for summary reversal.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision of the court of appeals should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General
EDWIN S. KNEEDLER
Assistant to the Solicitor General

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